# Petition

81-2010

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THE UNITED STATES SUPREME COURT

LILLIAN WILDER,

Petitioner

vs.

GILMAN PAPER COMPANY,

Respondant

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On appeal from the United States Court of Appeals for the Eleventh Circuit

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# Petition for Writ of Certiorari

ROBERT E. ROBINSON
1316 Abercorn Street
Savannah, Georgia

Counsel for Petitioner

## QUESTIONS PRESENTED FOR REVIEW

Petitioner, LILLIAN WILDER, hereby presents the following questions for review by this Honorable Court:

1. Did the Eleventh Circuit Court of Appeals err in affirming to the granting of the Defendant's Motion for Summary Judgment on all claims prior to the completion of discovery.

2. Did the Eleventh Circuit Court of Appeals err in affirming the lower court's ruling that the Federal Court was without jurisdiction to decide Plaintiff's Title VII claim for failure to file a charge with EEOC.

3. Did the Eleventh Circuit Court of Appeals err in affirming the lower court's ruling that a separate class action brought by another individual against the defendant did not toll the time in which Plaintiff was allowed to file an EEOC complaint.

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## STATEMENT OF JURISDICTION

The jurisdiction of this Honorable Court was invoked pursuant to 28 U.S.C. Section 1331, 1334, 2201 and 2202. Said case was filed in the United States District Court for the Southern District of Georgia, Brunswick Division, February 26, 1981. The District Court dismissed the petitioner's complaint, subsequent to that action, the petitioner appealed to the Eleventh Circuit Court of Appeals, whereby the decision was affirmed and judgment issued February 3, 1982. The Petitioner now seeks to appeal the Appellate Court;s decision pursuant to Title 28 U.S. Ann. Section 2101(c). Said Section provides that "any Writ of Certiorari intended to bring any judgment or decree in a civil action before the Supreme Court shall be applied for within ninety (90) days after the entry of such judgment or decree."

## CONSTITUTIONAL AND STATUTORY AUTHORITY

Said suit is authorized unded the following Constitutional and Statutory Provisions:

42 U.S.C. 1981: Equal Rights under the law

All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts pursued be parties, give evidence and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.

42 U.S.C. Section 1983: Civil Action for Deprivation of Rights

Anyone who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof through the deprivation of any rights, privileges, or immunities secured by con-stitution and laws, shall be liable to the

party indigent in action at law, suit and equity, or other proper proceedings for redress.

United States Code Ann. Const. Amendment V: Capital Crime; Double Jeopardy; Self Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of grand jury except in cases arising in a land or naval forces, or in the military, when a actual service in time of war or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. Code Ann. Const. Amendment XIV Section I: Citizenship; Privileg and Immunities; Due

Process; Equal Protection

All persons born and naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, limb or property, without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws.

U.S. Code Ann. Title 29 Section 216(a)(b): Fair Labor Standards Acts; Penalties; Civil and Criminal Liabilities; Injunction Proceedings Terminating Right of Actions; (see appendix)

42 U.S. Code Ann. Section(e)-2 EQUAL EMPLOYMENT OPPORTUNITIES: Unlawful Employment Practices (see appendix)

## STATEMENT OF THE CASE

This case involves a complaint filed by Plaintiff-Appellant Lillian Wilder, on her own behalf and on the behalf of all others persons similarly situated, to recover for alleged employment discrimination on the basis of sex under the Civil Rights Act of 1966, 42 U.S.C.A. Sections 1981, 1983 (1974); the Fifth and Fourteenth Amendment of the United States Constitution; Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000(e), et seq. (1974); the Fair Labor Standards Act of 1938, 29 U.S.C.A. Sections 201 et seq. 1978; and the National Labor Relations Act.

The jurisdiction of the Federal Court was invoked pursuant to 28 U.S.C. Section 1331, 1343(4), 2201 and 2202.

The Plaintiff-Appellant filed her complaint in the District Court on February 25, 1981 where she alleged that Gilman Paper Company, United Papermakers International Union, and

United Paper workers International Union Local 958 did discriminate against her and other similarly situated individuals. The class which the Plaintiff-Appellant represents is composed of persons who have been denied or will be denied equal employment opportunities by the defendant. Said denial is based upon the sex of the class members.

In Plaintiff-Appellant's complaint filed in the District Court, she stated that the defendant prefer and choose male applicants over female applicants on the basis of sex and thereby affording males higher paying and supervisory positions. The complaint further alleges that defendant only consider males for jobs that offers the greatest opportunities for training and advancements. The defendant intentionally attempted and in fact succeeded in propetuating the traditional sex roles.

The complaint filed, asked for declaratory judgment as to Plaintiff's rights and for a permanent injunctive-relief against defendant

from maintaining these policies of discrimination and the Union's failure to represent the Plaintiff-Appellant and the class she represents fairly.

The Plaintiff-Appellant was initially employed by Gilman Paper Company in 1959, she worked off and on for the company until 1963. She was terminated because of an on the job injury to her wrist which left her unable to perform the duties of her job. Plaintiff subsequently recuperated from her injury and reapplied for the position at defendant Saint Mary Georgia Plant in September 1964, September 1965, October 1968 and January 1980. Plaintiff alleged that she was discharged because of her sex, and that certain males with work related disabilities have been accommodated in their jobs whereas females have not. The Plaintiff-Appellant filed her complaint and prior to filing an answer the Defendant-Appellees filed a Motion for Summary Judgment and alternative Motion to Dismiss. On June 27,

1981 the District Court of the Southern District of Georgia, Brunswick Division issued an Order granting defendant's motion. The Court considered the motion as one for Summary Judgment as opposed to treating it as a Motion to Dismiss.

An action was filed with the Fifth Circuit Court of Appeals on July 13, 1981 to appeal the order of the United States District Court for the Southern District of Georgia, Brunswick Division granting Appellant's Motion for Summary Judgment.

On February 3, 1982 the 11th Circuit Court of Appeals affirmed the District Court's granting of Summaru Judgment. The Appellant hereby petitions for review by the Supreme Court of the United States.

## ARGUMENT IN SUPPORT OF WRIT OF CERTIORARI

The Petitioner is now seeking a Writ of Certiorari to the Supreme Court of the United States because actions of the 11th Circuit Court of Appeals, in affirming the District Court's decision, has departed from the accepted and usual course of judicial proceedings and further, has sanction a departure by the lower Court that calls for an exercise of this Court's power of supervision.

The Defendant's Motion for Summary Judgment was granted by the District Court and affirmed by the 11th Circuit Court as to all claims.

The Petitioner conceeds that certain claims are stronger than others, however, it is Petitioner's contention that the case was not proper for the granting of Summary Judgment.

The lower Court's granted the defendant's motion primary on the grounds that the Petitioner had not met the jurisdictional pre-

requisite of filing a complaint with the Equal Employment Opportunity Commission. The Petitioner's action is barred by her failure to file. There are cases handed down by Federal Courts that hold that the failure to file is not a jurisdictional bar. Coke vs. General Adjustment Bureau, Inc., 640 F. 2d. 584, 591 (5th Cir. 1981); Wallace vs. International Paper Company, 426 F. Supp. 352 (1977). There are also decisions to the contrary. Petitioner feels that this question could be properly resolved by this Honorable Court.

There are additional factors which the lower Courts failed to give adequate consideration. Specifically, the fact that Petitioner's claims are identical to those filed by another member of the class and that the acts complained of by the Petitioner are of a continuous nature.

Further, justice and equity requires that this Court review this case and remand it because of procedural departures. The Defendant-

never answered the complaint. The opposing party asked for additional time to provide an answer and instead filed a Motion to Dismiss. It was the Petitioner's reliance on representations made by the opposing counsel which accounts for the lack of more substantial evidence having been presented by the Petitioner.

Therefore, Petitioner asks that this Honorable Court exercise its supervisory authority to review the Petitioner's claim.

RESPECTFULLY SUBMITTED,

Robert E. Robinson & Assoc.
1316 Abercorn Street
Savannah, Georgia 31401

Robert E. Robinson
Attorney for Plaintiff

# Appendix

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 81-7701
Non-argument Calendar

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LILLIAN WILDER,
Plaintiff-Appellant

vs.

GILMAN PAPER COMPANY,

Defendant-Appellee

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Appeal from the United States District Court for the Southern District of Georgia

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( February 3, 1982 )

Before GODBOLD, Chief Judge, JOHNSON and ANDERSON, Circuit Judges.

PER CURIAM:

Lillian Wilder worked intermittently for Gilman Paper Company between 1959 and 1963. In 1963 the company terminated her because of an injury incurred on the job. Several applications for employment that she alleges she made between 1964 and 1980 were

rejected by Gilman. She has now brought this suit on her own behalf and as a class action seeking to recover for sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. Section 2000e, et seq; 42 U.S.C.A. Section 1981 & 1983; the Fair Labor Standards Act of 1938; the Labor Management Relations Act; and "customary international law." The district court granted summary judgment on all claims. We affirm.

Wilder's primary contentions on appeal concern the district court's summary judgment on her Title VII claim. Because Wilder had not first filed a charge with the Equal Employment Opportunity Commission (EEOC) as required by 42 U.S.C.A. Section 2000e-5(e), the court ruled that it lacked jurisdiction[1] to consider her complaint. Wilder protests that, because the violation she alleges was continuous, her failure to file a claim with the EEOC within 180 days of the discriminatory action against her, again as Section 2000e-5(e)

requires, does not bar her suit. Her argument, first, misapprehends the district court's decision. The court ruled that, because she had never filed a claim with the EEOC, she could not bring suit if federal court. Thus, even if her suit were not time-barred, her failure ever to file a charge based on the continuing violation would bar her suit in federal court. In any event, Wilder's claim that her suit was based on a continuing violation is incorrect. The mere fact that she was fired in 1963 and has subsequently allegedly been denied employment does not make out a continuing violation by Gilman. See United Airlines, Inc. v. Evans, 431 U.S. 553, 557-58 (1977). The deadline for filing a claim with the EEOC based on her charges has passed.

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1. The district court's holding that the failure to file a claim with the EEOC is a jurisdictional bar is understandable in light of the former Fifth Circuit precedent at the time of the district court's decision. Since that time the former Fifth Circuit has considered the loose and improper use of jurisdictional terminology in this context and

concluded that the EEOC filing requirement is in the nature of a limitations period and is not a jurisdictional bar. Coke v. General Adjustment Bureau, Inc., 640 F.2d 584, 591, n. 14 (5th Cir. 1981) (en banc); Allen v. United States Steel Corp., Slip Op. No. 80-7515 (5th Cir., Jan. 11, 1982), n. 2. Although the filing requirement is not jurisdictional, it is nevertheless a necessary precondition to filing suit, and we affirm on that basis.

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Wilder also contends that she need not have filed any claim with the EEOC because another plaintiff, a member of her class, in anouther lawsuit had filed with the EEOC. The former Fifth Circuit in the past articulated a narrow exception to the filing requirement, holding that if any member of a class files a claim with the EEOC based on identical patterns and practices of discrimination, the statute is tolled for all other potential claimants relying on the same act of discrimination as the basis of their claim. United States v. Georgia Power Company, 474 F.2d. 906, 925 (5th Cir. 1973). Wilder never shows that her allegations are identical to

to those in the claim that was filed. Given our findings that she has not shown a continuous violation, that her discharge occurred in 1963 before Title VII was enacted, and that the holding below that she would be an inappropriate class representative is correct, we conclude that she cannot rely on a claim filed by another individual in order to be relieved of the need to file her own claim.

Wilder makes no specific arguments contesting the district court's summary judgment on her other claim.[2] She does, however, argue generally that if she had been allowed further discovery she might have been able to prove some set of facts that would entitle her to recovery.[3] A district court is not, of course, required to withhold a decision on summary judgment until a party decides to proceed with discovery. See, e.g., Southern Rambler Sales, Inc. v. American Motors Corp., 375 F.2d 932, 937 (5th Cir. 1967) (summary judgment motion says in effect "meet

the affidavit facts or judicially die"). We agree with the district court that, even interpreting all facts in the light most favorable to the party opposing the motion, see Vetter v. Frosch, 599 F.2d 630, 632 (5th Cir. 1979), there is not dispute over material facts that would prevent summary judgment.

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2. The district court stated that it granted summary judgment rather than dismissed for failure to state a claim in which relief might be granted because it considered matters outside the pleadings. Its disposition was correct. See Fed.R.Civ.P. 12(b); 10 C. Wright & A. Miller, Federal Practice and Procedures Section 2713 (1973).

3. We reject Wilder's contentions that she was misled by Gilman and did not proceed with discovery because of defendant's statement that it needed additional time to answer her complaint. Regardless of Gilman's statements, however, she was given notice of Gilman's motion for summary judgment and had adequate opportunity for responding to that motion by raising disputed material facts. Because Wilder made no showing of cause for failure to proceed with discovery, we find her argument that she had insufficient time for discovery to be without merit. Save Our Cemeteries, Inc. v. Archdiocese of New Orleans, Inc., 568 F.2d 1074, 1978 (5th Cir.), cert. denied, 439 U.S. 830 (1978).

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We agree with the district court's resolution of all remaining claims of Wilder. Her claim under Section 1981 fails because sex discrimination does not fall within the scope of that statute. See e.g., Willingham vs. Macon Tel. Publishing Co., 482 F.2d 535, 537 n. 1 (5th Cir. 1973), vacated on other grounds, 507 F.2d 1084 (5th Cir. 1975) (en banc). Her Section 1983 claim also must fail. Such a claim must allege state action. See Adicker v. S. H. Kress & Co., 398 U.S. 144, 150-52 (1970). Wilder makes no charge of state action and makes no allegation that we might construe possibly to involve state action. Her claim under the Fair Labor Standards Act, alleging a violation of the equal pay provision of the Act, 29 U.S.C.A. Section 206(d), was brought 17 years after the last possible accrual of her cause of action and is barred by the statute of limitations for that Act, 29 U.S.C.A. Section 255(a). Also barred by the statute of limitation is her

her claim under the Labor Management Relations Act alleging a breach of a collective bargaining agreement in violation of 29 U.S.C.A. Section 1985. The relevant statute of limitations for such a claim is the closest state statute, here Georgia's six-year limitations period for contract suits, Ga. Code Ann. Section 3-705. See Kaufman and Broad Homes Sys., Inc. vs. International Br. of Firemen, 607 F.2d 1104, 1108 (5th Cir. 1979). Since the last breach of contract regarding Wilder would have occurred in 1963 -- not, as she contends, on her last employment application -- her suit was not timely. Finally, Wilder's claims concerning violations of "customary international law" are too vague to be cognizable by this Court.

We also agree with the district court's holding that the case should not be certified as a class action. A party with claims, intents, and injuries different from those of the class she purportedly represents should

not have her suit certified as a class action under Fed.R.Civ.P. 23(a). See East Texas Motor Freight System, Inc. v. Rodriquez, 431 U.S. 395, 403-04 (1977). Given our disposition of Wilder's individual claims, we find that she possesses neither the same interests nor the same injuries as other purported class members.

AFFIRMED.

42 U.S.C. Section 2000e-2: Unlawful employment practices

(a) It shall be an unlawfull employment practice for an employer ----

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national orgin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

29 U.S.C. Section 216: Penalties; civil and criminal liability; injunction proceedings terminating right of action

(a) Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provision of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he

gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under Section 217 of this title in which restraints is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under Section 206 or Section 207 of this title by an employer liable therefor under the provisions of this subsection.

## CERTIFICATE OF SERVICE

I, ROBERT E. ROBINSON, do certify that I have served a copy of the foregoing Petition upon attorney(s) of record for all parties in this action by depositing a copy of same in the United States mail with proper postage attached.

This 28th day of April, 1982.

Mahoney Hadlow & Adams

Guy O. Farmer II.
Catherine C. Cosby
800 Barnett Bank Building
100 Laura Street
Post Office Box 4099
Jacksonville, Florida 32201

By _____
ROBERT E. ROBINSON & ASSOCIATES, P.C.
1316 Abercorn Street
Savannah, Georgia 31401

# Appendix

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Number 81-2010

THE UNITED STATES SUPREME COURT

LILLIAN WILDER,

Petitioner

vs.

GILMAN PAPER COMPANY,

Respondent

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On appeal from the United States Court of Appeals for the Eleventh Circuit

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# Addendum to the Appendix of Petitioner's Writ of Certiorari

ROBERT E. ROBINSON
1316 Abercorn Street
Savannah, Georgia

Counsel for Petitioner

UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF GEORGIA

BRUNSWICK DIVISION

| | | |
|---|---|---|
| LILLIAN WILDER, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | CV 281-35 |
| | ) | |
| GILMAN PAPER CO. | ) | |
| | ) | |
| Defendant. | ) | |

O R D E R

Plaintiff, Lillian Wilder, brings this action on her own behalf and on behalf of all others persons similarly situated, to recover for alleged employment discrimination on the basis of sex under the Civil Rights Act of 1866, 42 U.S.C.A. Section 1981, 1983 (1974); the Fifth and Fourteenth Amendments to the United States Constitution; Thitle VII of the Civil Rights Act of 1964, 42 U.S.C.A. Section 20003, et seq; and finally, under "customary international law".

In her deposition, plaintiff testified that she was initially employed by the Gilman Paper Company in 1959. She worked off and on for the company until 1963. In 1963, she was terminated because an on the job injury to her wrist left her unable to perform the duties of her job. Plaintiff subsequently recuperated from her injury and reapplied for a job at defendant's St. Marys, Georgia Plaint in March, 1964, September, 1964, September, 1965, October, 1968, and January, 1980. Deposition of Lillian Wilder, pp. 31-40. Each time plaintiff reapplied, she was told either that there were no jobs available at that time, or that applications were not being accepted at that time. Id.

Plaintiff alleges that she was discharged because of her sex, and that certain males with work related disabilities have been accommodated in their jobs whereas

females have not. She further alleges that defendant has discriminatorily refused to rehire her.

Plaintiff has never filed a grievance with a union representing the employees of Gilman Paper Company. Neither has plaintiff filed a claim with the Equal Employment Opportunity Commisssion, the Wage Hour Division of the Department of Labor, or with any other federal, state or local agency in which she has alleged any violation of any of her rights by Gilman Paper Company. Deposition of Lillian Wilder, pp. 28, 41.

This case is presently before the Court on defendant's motion for summary judgment and alternative motion to dismiss. While the Court is generally reluctant to consider a motion for summary judgment before significant discovery has taken place, in this case it is abundantly clear that further discovery could serve no useful purpose. In those areas where summary

judgment has been granted, it is evident that plaintiff could produce no set of facts which would entitle her to recovery. The Court considers this motion as one for summary judgment (as opposed to treating it as a motion to dismiss) only because it is necessary to examine the deposition of plaintiff and the affidavits produced by both parties to fully understand the sparse allegations advanced in the complaint.

PLAINTIFF'S TITLE VII CLAIM

It is elementary that a district court has no jurisdiction over a Title VII claim unless the claimant has first filed a charge with the Equal Employment Opportunities Commission. 42 U.S.C.A. Section 2000e-5(e) (1974); McArthur vs. Southern Airways, Inc., 569 F.2d 276 (5th Cir. 1978); Cutliff vs. Greyhound Lines, Inc., 558 F.2d 803 (5th Cir. 1977); See also, Alexander v. Gardner

Denver Company, 415 U.S. 36 (1974). Since plaintiff admits that she has never filed such a charge, her Title VII claim must be dismissed.

Plaintiff's protestations that exhaustion of administrative remedies would be useless are irrelevant and totally without merit. The requirement of filing a charge before the EEOC is jurisdictional. Since no charge has been filed, this Court has no power to consider plaintiff's Title VII claim. McArthur vs. Southern Airways, Inc., 569 F.2d 276 (5th Cir. 1978).

PLAINTIFF'S CLAIMS UNDER SECTION 1981

Employment practices which discriminate on the basis of sex are not remediable under 42 U.S.C.A. Section 1981 (1974). Runyon v. McCrary, 427 U.S. 160 (1976); Willingham v. Macon Telegraph Publishing Company, 482 F.2d 535 (5th Cir. 1973), vacated on other grounds, 507 F.2d 1084

(5th Cir. 1975). After defendant filed its motion for summary judgment and pointed out this fact, however, plaintiff replied:

> "Rather than assert that she has been sexually discriminated against in violation of 42 U.S.C. Section 1981, the plaintiff instead brings this action under Section 1981 to vindicate racial discrimination."

Plaintiff's brief in opposition to defendant's motion for summary judgment, p. 6.

Even a cursory examination of Plaintiff's complaint reveals that it rests upon the sole and exclusive allegation that plaintiff and other female workers at Gilman Paper Company were discriminated against on the basis of their sex. Indeed, the word race is never mentioned in the complaint. Plaintiff's attempt to now characterize her claim as one for racial discrimination is insufficient to amend her complaint. Since plaintiff's complaint seeks redress solely for alleged discrimination on the basis of sex, her claim under 42 U.S.C.A Section 1981 (1974) must be dismissed.

## PLAINTIFF'S CLAIMS UNDER SECTION 1983

In the brief in opposition to defendant's motion for summary judgment, plaintiff states, "The defendant Company not having moved for summary judgment on the section 1983 claim the plaintiff is still in court on that allegation." Not quite. Defendant has moved for total summary judgment on all points, alleging that, "there are no genuine issues as to any material fact regarding any of plaintiff's claims and the Company is entitled to judgment as a matter of law." Defendant's motion for summary judgment, p. 1.

The mere fact that defendant did not specifically address plaintiff's claim under 42 U.S.C.A. Section 1983 (1974) does not prevent the Court from recognizing the axiom that a complaint under Section 1983 is fatally flawed unless it alleges that damages flow from state action. Adickes

v. S. H. Kress and Company, 398 U.S. 144 (1970); Greco v. Orange Memorial Hospital Association, 513 F.2d 873 (5th Cir.), cert. denied, 423 U.S. 1000 (1975). Since Gilman Paper Company appears to be a purely private concern and since plaintiff has made no allegation that her damage was the result of state action, that portion of her complaint which is based on 42 U.S.C.A. Section 1983 (1974) should be dismissed.

## THE FAIR LABOR STANDARDS ACT

Plaintiff's claim under the Fair Labor Standards Act of 1938 is based upon her allegation that defendant violated the equal pay provisions fo the that Act, 29 U.S.C.A. Section 206(d) (1978).

Defendant correctly argues that any possible blaim plaintiff could have under this Act is barred by the applicable statute of limitations. Any cause of action based on the Equal Pay Act must be brought within

two years after the cause of action accrued (three years if the violation was willful) or "be forever barred". 29 U.S.C.A. Section 255(a) (1975); Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139 (5th Cir. 1971), cert. denied, 409 U.S. 948 (1972). Since plaintiff was last paid by defendant in 1963, it follows that any claim alleging that she did not received equal pay for equal work necessarily accrued more than three years before the institution of this suit.

Plaintiff argues that the stature of limitations might have been tolled by an investigation of the Secretary of Labor. Even assuming, arguendo, that such an investigation took place, administrative proceedings do not in any way toll or otherwise affect the statute of limitations imposed by 29 U.S.C.A Section 255(a) (1975). See, Unexcelled Chemical Corporation vs. United States, 345 U.S. 59 (1952); Aguilar v. Clayton, 452 F. Supp. 896 (E,D, Okla. 1978).

Similarly, plaintiff's argument that the statute of limitations does not apply to cases where an employee is discharged for making a complaint to the Secretary of Labor is totally irrelevant where, as here, the plaintiff alleges she was discharged for other reasons.

Since plaintiff brings her claim under the Equal Pay Act over 17 years after the possible accrual of a cause of action, it is clear that such a claim is barred by the applicable statute of limitations. 29 U.S.C.A. Section 225(a) (1975).

THE NATIONAL LABOR RELATIONS ACT

Plaintiff alleges that defendant's action toward her constitute a breach of the collective bargaining argeement between Gilman and the unions representing Gilman employees, and that this breach is actionable under Section 301 of the Labor Manage-

ment Relation Act, 29 U.S.C.A. Section 185 (1978).

The statute of limitations on such actions is the most applicable state statute. Kaufman and Broad Home Systems, Inc. v. International Brotherhood of Firemen, 607 F.2d 1104 (5th Cir. 1979). Here, Georgia's statute of limitations for actions on contracts, Ga. Code Ann.. Section 3-705 (1975), would apply. This statute provides that, "A;; actions upon . . . simple contracts in writing shall be brought within six years." Since plaintiff has not been employed at Gilman Paper Company in over 17 years, it is certain that she does not have a cause of action for breach of contract which matured less than six years before the institution of this suit.

Though plaintiff agrees that the state statute of limitations governs this cause of action, she argues that defendant's refusal to rehire her in 1980 constitutes

a cause of action which accrued less than six years ago. While such a refusal to rehire a worker may indeed be actionable, it is clear that it would not constitute a breach of contract. At best, a refusal to rehire in a case such as this could be unfair labor practice under 29 U.S.C.A. Section 158 (1973). The National Labor Relations Board has jurisdiction over such matters, not this Court. 29 U.S.C.A. Section 160(b) (1973).

It is clear, therefore, that plaintiff has no cognizable claim under the National Labor Relations Act in this Court.

INTERNATIONAL LAW

In addition to her other claims, plaintiff asserts that she has stated a claim under "customary international law" and under the United Nations Charter. While certain aspects of international law are often effectuated by specific statutes passed

by the Congress and signed by the President, it is elementary that general principles of international law and even specific codifications of international law such as the United States Nations Charter are not self-effectuating. See, Sei Fugii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952). This Court has no choice but to dismiss such vague allegations of nonconformance with international law.

CLASS ALLEGATIONS

Since plaintiff has failed to establish an individual cause of action against defendant, it is clear that she also lacks standing to represent females employees at Gilman Paper Company with similar complaints. East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395 (1977). It is apparent that plaintiff is not part of the same class of people she seeks to represent. Neither does she posses the same interests or suffer

the same injury of the class members named in the complaint. See, United States Parole Commission v. Geraghty, 445 U.S. 388 (1980). It follows, therefore, that plaintiff's class allegations should be dismissed.

DEFENDANT'S MOTION FOR COSTS AND EXPENSES

The Court will reserve ruling on defendant's motion for costs and expense until such a time as a hearing can be held on this matter.

Since it appears that plaintiff has no cognizable cause of action before this Court, and that no genuine issue of material fact remains in this case, it follows, therefore, that defendant's motion for summary judgment should be, and is hereby GRANTED. Fed. R. Civ. P. 56. The Clerk is directed to enter an appropriate judgment dismissing plaintiff's claims.

SO ORDERED, this 27th day of June, 1981.

## CERTIFICATE OF SERVICE

I, ROBERT E. ROBINSON, do certify that I have served a copy of the foregoing addendum to the Apendix of petitioner's Writ of Certiorari upon attorney(s) of record for all parties in this action by depositing a copy of same in the United States Mail with proper postage attached.

This 13th day of May, 1982.

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# Opposition

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No. 81-2010

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

LILLIAN WILDER,

*Petitioner,*

—vs.—

GILMAN PAPER COMPANY,

*Respondent.*

## ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

**BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

FOR THE PURPOSES OF THIS BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI, RESPONDENT ADOPTS THE FORMAT OF THE QUESTIONS PRESENTED FOR REVIEW BY PETITIONER.

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## STATEMENT OF THE CASE

### I. PROCEEDINGS BELOW

#### A. THE COMPLAINT

Plaintiff-petitioner, Lillian Wilder (hereinafter "Petitioner") filed a Complaint in the U.S. District Court for the Southern District of Georgia on February 26, 1981, alleging that Gilman Paper Company (hereinafter "Company"), the United Paper Workers, and Paperworkers International Union, Local 958, St. Marys, Georgia, (hereinafter "Unions") and the State of Georgia had discriminated against her and "all other persons similarly situated" because of sex in violation of 42 U.S.C. § 2000(e) of the Civil Rights Act of 1964 (hereinafter "Title VII"); 42 U.S.C. § 1981 (hereinafter

"§ 1981); 42 U.S.C. § 1983 (hereinafter "§ 1983"); the Fifth and Fourteenth Amendments to the United States Constitution; the National Labor Relations Act, 29 U.S.C. § 151 et seq., the Fair Labor Standards Act of 1938, 29 U.S.C. § 201, et seq., and, finally, under "customary international law."

The Complaint contained a cursory description of the class that Petitioner allegedly represented, and simply paraphrased the class action requirements of Rule 23, Fed. R. Civ. P. In addition, Petitioner's personal grievance was difficult to determine, although it appeared to relate to her termination from the Company in 1963. The Complaint contained no allegation that Petitioner ever filed a charge with the United States Equal Employment Opportunity Commission (hereinafter "EEOC") or any other governmental agency. Petitioner failed to allege any state action by the Company.

Finally, Petitioner's Complaint was limited to sex discrimination.

The defendant Unions and the State of Georgia had been dismissed on motions prior to the time that the Company filed its alternative motions directed to the Complaint. Petitioner has not pursued an appeal against either of those defendants.

B. THE COMPANY'S MOTIONS DIRECTED TO THE COMPLAINT.

On May 8, 1981, the Company filed alternative motions for summary judgment and to dismiss for failure to state a claim upon which relief could be granted. The Company attached the deposition of Petitioner and the affidavit of John Love, the Industrial Relations Manager of the Company, in support of the motions. The motions addressed Petitioner's numerous claims and argued that Petitioner had failed to raise a genuine issue as to any material fact and that the Company was entitled to a judgment as a

matter of law. The Company also requested that the Court award its costs and expenses, including a reasonable attorney's fee.

C. THE DISTRICT COURT'S DECISION GRANTING THE COMPANY'S MOTION.

On June 27, 1981, the District Court granted the Company's summary judgment motion. The court dismissed Petitioner's Title VII claims due to her failure to file an EEOC charge. Since Petitioner's Complaint sought redress solely for alleged discrimination because of her sex, her § 1981 claim was dismissed. Petitioner's § 1983 claim was dismissed due to her failure to allege the requisite state action. Petitioner's claims under the Fair Labor Standards Act and the National Labor Relations Act were dismissed due to her failure to comply with the applicable statutes of limitation. The Court also dismissed Petitioner's claims under "customary international law." Finally, the Court dismissed the class alle-

gations and reserved ruling on the Company's motion for costs and expenses.

D. THE ELEVENTH CIRCUIT'S PER CURIAM DECISION AFFIRMING THE DISTRICT COURT'S DECISION.

Petitioner then appealed the District Court's summary judgment order. Petitioner argued that the District Court erred in granting summary judgment to the Company before it had answered and before Petitioner had pursued discovery. Petitioner also argued that the District Court had erred in dismissing her Title VII claim because of the continuing nature of the violation and/or because of equitable tolling principles. Petitioner did not appeal the District Court's decision regarding her claims under § 1981 and § 1983, the United States Constitution, the Fair Labor Standards Act, the National Labor Relations Act, "customary international law," and the class action allegation.

On February 3, 1982, an Eleventh Circuit panel (Godbold, Chief Judge, Johnson and Anderson, Circuit Judges) affirmed per curiam the District Court's order. The Eleventh Circuit carefully addressed and rejected each of Petitioner's arguments. In concluding that the District Court was correct in dismissing Petitioner's Title VII claim for failure to file with the EEOC, normally a necessary pre-condition to filing suit in federal court, the Eleventh Circuit found that there were no equitable circumstances present which would "toll" the limitation period; that Petitioner had failed to show a continuing violation; that Petitioner's discharge occurred before Title VII was enacted; and finally, that Petitioner was an inappropriate class representative.

The court acknowledged a narrow exception to the EEOC filing requirements, citing Fifth Circuit precedent which held that if

any member of a class files a claim with the EEOC based on identical patterns and practices of discrimination, the statute is tolled for all other potential claimants relying on the same act of discrimination as the basis for their claim. However, the Eleventh Circuit found that Petitioner failed to demonstrate that her allegations were identical to those in the claim that was filed and concluded that she could not rely on the claim filed by the other individual in order to be relieved of the need to file her own claim.

The Eleventh Circuit found that the District Court's actions were procedurally correct in that a District Court is not required to withhold a decision on summary judgment until a party decides to proceed with discovery. The Eleventh Circuit specifically rejected Petitioner's contention that her failure to file was excused because she was misled and did not proceed

with discovery in reliance on the Company's statement that it needed additional time to answer the Complaint. The court found that regardless of the Company's prior representations, Petitioner was given notice of the Company's motion for summary judgment and had adequate opportunity for responding to that motion by raising disputed material facts. Finding that Petitioner made no showing of cause for failure to proceed with discovery, the court rejected her argument that she had insufficient time for discovery.

Finally, based on the disposition of Petitioner's individual claims, the court found that she possessed neither the same interests nor the same injuries as other purported class members and affirmed the denial of class certification.

## II. STATEMENT OF THE FACTS

### A. PETITIONER'S EMPLOYMENT HISTORY.

Petitioner was initially employed under the name, Lillian Woods, on October 15, 1959, as a Machine Tender in the Grocery Bag Department of the Company's Kraft Bag Division, which was located at the time in Savannah, Georgia. She was then transferred to St. Marys, Georgia, when the entire operation moved. On March 10, 1960, she was terminated. She was rehired on a temporary basis as a Temporary Machine Tender in the Multi Wall Department on March 30, 1961. That temporary job ended on May 3, 1961. She was rehired in a temporary position as Machine Tender in the Grocery Bag Department on May 15, 1961. She was terminated on December 27, 1963, due to her physical inability to perform the Machine Tender job.

Although the Company had no record that Petitioner had ever applied for a job at the Company since her termination, Petitioner

testified at her deposition that she had orally inquired about a position with the Company on several occasions - March, 1964; September, 1964; September, 1965; October, 1968; and January, 1980. According to her deposition, each time she re-applied she was told either that there were no jobs available at that time or that applications were not being accepted at that time.

Petitioner has never filed a grievance with a union representating the employees of the Company. Neither has she filed a claim with the EEOC, the Wage-Hour Division of the United States Department of Labor, or any other federal, state or local agency.

## SUMMARY OF REASONS FOR OPPOSING THE PETITION

The Eleventh Circuit's affirmance of the District Court's grant of summary judgment was correct and fully justified. First, there were no "procedural departures" justifying a petition to this Court because the

law is clear that a defendant may move for summary judgment prior to filing an answer and Petitioner was not deprived of her right to engage in timely discovery.

Second, the Eleventh Circuit correctly rejected Petitioner's argument that equitable tolling principles salvaged her Title VII claim. The mere fact that Petitioner's attorney had earlier pursued a separate "class action" against the Company (in which the alleged class was never certified and the suit was dismissed at an early stage on summary judgment motion for, in part, failure to timely file an EEOC charge) is not sufficient to toll the EEOC filing limitation period. Petitioner has failed to raise any disputed issue of material fact which would excuse her from filing within 180 days of the date she knew of the facts which gave rise to her Title VII claim.

Third, Petitioner's characterization of the Company's conduct as a "continuing

violation" is incorrect and unsupported. The mere allegation that the Company refused upon a number of occasions to rehire an employee terminated prior to the effective date of the Act does not make out a claim of continuing violation under Title VII.

Finally, Petitioner's attempt to seek review of her claim based on a split in the Circuit Courts of Appeal on the issue of the nature of Title VII's filing prerequisite is without merit. This Court resolved the split in Zipes v. Trans World Airlines, Inc., 450 U.S. 139 (1982), prior to the filing of Petitioner's brief. In fact, the Fifth and Eleventh Circuits (as clearly articulated in the Eleventh Circuit's opinion below) had already adopted the principle that the filing limitation period was nonjurisdictional and was subject to equitable modification.

Since Petitioner and her attorney continued to pursue an appeal after it was clearly futile and wasteful to do so,

Respondent urges that the Court assess reasonable attorneys' fees and expenses incurred on this appeal against Petitioner and/or her Counsel pursuant to the Supreme Court Rules and the Court's inherent power to impose sanctions to achieve an orderly and expeditious disposition of cases.

## REASONS FOR OPPOSING THE PETITION

### I. SINCE PETITIONER HAD NOTICE OF THE COMPANY'S MOTION FOR SUMMARY JUDGMENT, HAD ADEQUATE OPPORTUNITY TO RESPOND TO THE MOTION AND FAILED TO RAISE THE EXISTENCE OF A GENUINE ISSUE OF MATERIAL FACT, THE ELEVENTH CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT TO THE COMPANY.

Petitioner contends, without citation to authority, that "justice and equity" require that this Court grant review and remand this case because of "procedural departures." Petitioner's Brief (hereinafter P.B.) 10. Petitioner asserts that the lower courts erred in granting summary judg-

ment to the Company prior to its service of an answer and prior to Petitioner's pursuit of discovery. P.B. 11. As demonstrated below, and as articulated by the Eleventh Circuit opinion, the grant of summary judgment to the Company was fully justified in this case.

### A. DEFENDANT MAY MOVE FOR SUMMARY JUDGMENT PRIOR TO THE SERVICE OF A RESPONSIVE PLEADING.

Rule 56(b) of the Federal Rules of Civil Procedure authorizes a defending party to move "at anytime" for summary judgment in its favor. The proposition is well-settled that a defendant is not required to file an answer before moving for summary judgment. First National Bank of Arizona v. Cities Service Company, 391 U.S. 253 (1968); Southern Pacific Transportation Company v. National Molasses Company, 540 F.2d 213, 214 (5th Cir. 1976); Hubicki v. ACF Industries, Inc., 484 F.2d 519 (3rd Cir. 1973); Kidder v. Eastern Airlines, Inc., 469 F. Supp. 1060, 1065 Note 5 (S.D. Fla. 1978).

B. THE GRANT OF SUMMARY JUDGMENT PRIOR TO THE OPPOSING PARTY'S INSTITUTION OF DISCOVERY IS CONSISTENT WITH THE PRINCIPLES OF JUSTICE AND EQUITY UNDER THE CIRCUMSTANCES OF THIS CASE BECAUSE PETITIONER HAD ADEQUATE OPPORTUNITY TO ENGAGE IN DISCOVERY PRIOR TO THE GRANTING OF RESPONDENT'S MOTION AND FURTHER OPPORTUNITY FOR DISCOVERY WOULD HAVE BEEN FUTILE.

The courts will not delay decision on a summary judgment motion to allow discovery even under Rule 56(f) when the discovery sought could have been instituted earlier, especially when there is no reason to believe that it will lead to a denial of the motion. Southern Rambler Sales, Inc. v. American Motors Corporation, 375 F.2d 932 (5th Cir. 1967), cert. denied, 389 U.S. 832 (1967); Save Our Cemetaries, Inc. v. Arch Diocese of New Orleans, Inc., 568 F.2d 1074 (5th Cir. 1978), reh. denied, 572 F.2d 320, cert. denied, 439 U.S. 836 (1978). Under the circumstances of this case, Petitioner was not prevented from pursuing discovery immedi-

ately upon filing of the complaint. See Fed. R. Civ. P., Rules 30(a), 33(a), 34(b), and 36(a). Indeed, as the Eleventh Circuit concluded, even if Petitioner was misled by the Company and did not proceed with discovery because of the Company's statement that it needed additional time to file an answer, she was given notice of the Company's motion for summary judgment and had adequate opportunity for responding to that motion by discovering and raising disputed material facts. Contrary to Petitioner's assertion, justice and equity require that individuals not be allowed to take advantage of a situation which is, in fact, created by their own lack of diligence in pursuing discovery.

Finally, even assuming arguendo that Petitioner had been prevented from pursuing discovery after filing suit, it is clear that Petitioner's unjustified failure to file a timely EEOC charge, coupled with her failure to comply with other applicable statute of

limitation periods and administrative requirements, require the legal conclusion that Petitioner did not meet the necessary prerequisites to filing this suit in federal court. As a result, further discovery would have served no useful purpose.

## II. A SEPARATE CLASS ACTION SUIT BROUGHT BY ANOTHER INDIVIDUAL AGAINST THE COMPANY WHICH WAS SUBSEQUENTLY DISMISSED BY SUMMARY JUDGMENT DOES NOT, UNDER THE CIRCUMSTANCES OF THIS CASE, TOLL THE TIME IN WHICH PETITIONER WAS REQUIRED TO FILE AN EEOC CHARGE.

Petitioner's attempt to salvage her Title VII claim by arguing that the time for filing her EEOC charge was tolled by the filing of an EEOC charge by another individual plaintiff who brought an earlier class action suit against the Company was correctly rejected by the lower courts. First, the other suit, Fowler v. Gilman Paper Company, et al., No. 279-12 (S.D. Ga., filed Oct. 4, 1979) aff'd per curiam, No. 79-3662 (5th Cir. May 7, 1980), brought by the same attorney, was like the case now before this

Court dismissed at any early stage on the Company's summary judgment motion, the decision being based in part on Fowler's failure to file a timely EEOC charge. Second, the Fowler court refused to certify the class and dismissed the conclusory class action allegations at the same early stage of the proceedings. Third, even if Fowler had filed a timely EEOC charge, this Petitioner still must comply with the 180-day filing period since she seeks relief in a separate action. Inda v. United Airlines, Inc., 565 F.2d 554 (9th Cir. 1977), cert. denied 435 U.S. 1007 (1978); Bertheas v. Trans World Airlines, Inc., 450 F. Supp. 1069 (E.D. N.Y. 1978). Finally the circumstances in which courts have generally tolled or waived the filing period limitations under Title VII (e.g., during the pendency of an action before a state court with jurisdiction over the subject matter, deferring the commencement of the 180 days until a claimant knew or

should have known the facts which would give rise to a Title VII claim, or deferral when the EEOC has misled a complainant about the nature of the individual's rights under Title VII) clearly do not apply to Petitioner. See generally Zipes v. Trans World Airlines, Inc., 450 U.S. 139, 102 S. Ct. 1127 (1982); Chappell v. Emco Machine Works Co., 601 F. 2d 1295, 1302-1303 (5th Cir. 1979).

## III. THE ELEVENTH CIRCUIT CORRECTLY HELD THAT NEITHER THE 1963 TERMINATION NOR THE ALLEGED SUBSEQUENT DISCRIMINATORY REFUSALS TO REHIRE PETITIONER ARE CONTINUING VIOLATIONS UNDER TITLE VII

Petitioner's contention that her suit was based on a continuing violation is unsupported and incorrect. Petitioner's complaint involves the pre-Act termination of her employment in 1963 and her deposition revealed that she also claims to have been discriminatorily refused re-employment in March 1964; September 1964; September 1965; October 1968; and January 1980. However, as

the Eleventh Circuit correctly held, the mere fact that she was fired and subsequently allegedly denied employment fails to make out a claim of continuing violation. See United Airlines, Inc. v. Evans, 431 U.S. 553, 557-558 (1977); Hodge v. McLean Trucking Company, 607 F.2d 1118 (5th Cir. 1979); Bracamontes v. Amstar Corp., 576 F.2d 61 (5th Cir. 1978); Molybdenum Corp. of America v. EEOC, 457 F.2d 935 (10th Cir. 1952); Smith v. Office of Economic Opportunity for State of Arkansas, 538 F.2d 226 (8th Cir. 1976). Even assuming arguendo that each alleged refusal to rehire petitioner was a separate act of discrimination, under the circumstances of this case her failure to timely file an EEOC charge based on the alleged January 1980 application bars her claim under Title VII. Guatam v. First National City Bank, 425 F. Supp. 579, 582 (S.D. N.Y. 1976) cert. denied 440 U.S. 919 (1976). Thus, as the Eleventh Circuit concluded, the

deadline for filing a timely charge with the EEOC has passed.

IV. THE DECISION BELOW FAILS TO PRESENT ANY REAL CONFLICT QUESTION SINCE NO ACTUAL CONFLICT EXISTS BETWEEN THE DECISION BELOW AND PRIOR HOLDINGS OF THIS COURT OR OTHER CIRCUITS AND, IN ADDITION, THE ELEVENTH CIRCUIT'S AFFIRMANCE OF THE DISMISSAL FOR FAILURE TO FILE WAS NOT BASED ON AN IMPERMISSIBLE JURISDICTIONAL ANALYSIS.

A recent decision by this Court, Zipes v. Trans World Airlines, Inc., 450 U.S. 139, (1982), (held that filing a timely charge with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to equitable modification) moots Petitioner's argument that there is presently a split in the Circuits regarding the nature of the EEOC filing requirement which needs to be resolved by this Court. P.B. 10. The split was, in fact, resolved by Zipes prior to the filing of the Petitioner's brief.

Furthermore, the Eleventh Circuit explicitly considered Petitioner's claims in light of the "equitable modification" standard previously articulated in Coke v. General Adjustment Bureau, Inc., 640 F.2d 584, 591, n. 14 (5th Cir. 1981) (en banc) (cited with approval in Zipes, 102 S. Ct. at 1132-1135 n.7, n.12 and n.14). The Eleventh Circuit opinion below carefully addressed and rejected Petitioner's "tolling" arguments (e.g. allegations of a continuous violation and benefits sought to be derived from a prior class action suit brought by an alleged member of Petitioner's alleged "class"). Such reasoning would have been gratuitous if the filing reqirement had been strictly construed by the Eleventh Circuit as "jurisdictional." Thus, contrary to Petitioner's unsubstantiated assertions, the law of the Fifth and Eleventh Circuits is in harmony with the holdings of this Court. As a result, there is no basis for this peti-

tion, since any conflict which existed prior to Zipes has been resolved and the Eleventh Circuit's determination that Petitioner's Title VII claim was properly dismissed for failure to file was not, in fact, based on an impermissible "jurisdictional" analysis.

## CONCLUSION

Due to the extraordinarily frivolous nature of Petitioner's request for certiorari, Respondent requests that this Court award Respondent its reasonable attorneys' fees, expenses and costs pursuant to U.S. Supreme Court Rules 49.2 and 50. Petitioner's counsel has pursued this appeal and continued to litigate after it was clearly futile to do so; thereby, wasting the scarce resources of this Court and of Respondent. Due to this flagrant abuse of the judicial system by Petitioner's attorney, Respondent submits that it is appropriate to assess reasonable fees and expenses against Petitioner's Counsel in order to deter this and

other attorneys from engaging in frivolous and wasteful appellate litigation. Such an award could be made pursuant to Supreme Court Rules 49.2 and 50 and pursuant to the inherent power of this Court to impose sanctions to achieve an orderly and expeditious disposition of cases. See generally Roadway Express v. Piper, 447 U.S. 752 (1980); National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976); Note, The Emerging Deterence Orientation In The Imposition Of Discovery Sanctions, 91 Harv. L. Rev. 1033, 1054 (1978).

For the foregoing reasons, Respondent respectfully requests that the Court decline to grant review on certiorari in this matter and respectfully prays that the judgment below be affirmed and that the Court award Respondent reasonable attorneys' fees, expenses, and costs incurred on this appeal.

Respectfully submitted,

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